

ORIGINAL**FILED**

09 DEC 11 PM 3:52

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIABY: 

DEPUTY

1 David S. Blau (Bar No. 166825)
 2 BLAU & ASSOCIATES, P.C.
 3 6080 Center Drive, Suite 550
 4 Los Angeles, California 90045
 (310) 410-1900 phone
 (310) 410-1901 fax
 david@blaulaw.net

5 Attorneys for Plaintiff,
 6 American Safety Indemnity Company

7
 8 **UNITED STATES DISTRICT COURT**
 9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
 11 **AMERICAN SAFETY INDEMNITY**
 12 **COMPANY, an Oklahoma Corporation,**

13 Plaintiff,

14 vs.

15 **NATIONAL UNION FIRE**
 16 **INSURANCE COMPANY OF**
 17 **PITTSBURGH, PA., a Pennsylvania**
 18 **Corporation; and DOES 1 through 10,**
 19 **inclusive,**

20 Defendants

09-cv-2778 LAB AJB

COMPLAINT FOR:

- (1) Declaratory Relief
 (2) Equitable Contribution

JURY TRIAL DEMANDED

21 COMES NOW plaintiff American Safety Indemnity Company ("ASIC")
 22 and alleges against the defendants, and each of them as follows:

23 **THE PARTIES**

24
 25 1. Plaintiff ASIC brings this action for declaratory relief and equitable
 26 contribution on its own behalf. ASIC is a corporation organized under the laws
 27 of Oklahoma, and was and now is, authorized to transact business in the State of
 28 California and adjusted construction defect claims arising out of an action filed

CR

VIA FAX

1 against one of its insureds in the County of San Diego wherein many of the facts
2 and circumstances and damages giving rise to this action have occurred.

3
4 2. Plaintiff is informed and believes and thereon alleges that National
5 Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") is a
6 corporation organized under the laws of Pennsylvania, and was, and now is, and
7 in fact does transact business in the State of California including the County of
8 San Diego.

9
10 3. Plaintiff is informed and believes and thereon alleges that DOES 1 to
11 10 are entities authorized to do and are doing business in the State of California
12 as insurers. The true names and capacities of the Defendants designated as
13 DOES 1 to 10 are unknown to Plaintiff, and therefore are sued by fictitious
14 names. Plaintiff is informed and believes, and thereon alleges, that each of the
15 Defendants designated as DOES 1 to 10 is legally responsible in some manner
16 for the matters described in this Complaint and therefore names them as parties.
17 Plaintiff therefore reserves leave to amend this complaint to assert the proper
18 names of each defendant in the future.

19
20 **JURISDICTION**

21
22 4. Plaintiff is a corporation under the laws of the State of Oklahoma,
23 having its principal place of business in the State of Georgia. Defendant
24 National Union is an insurance corporation incorporated under the laws of
25 Pennsylvania, with its principal places of business in New York (corporate
26 offices) and Pennsylvania (state of incorporation). This Court has original
27 jurisdiction under 28 U.S.C. § 1332 in that it is a civil action between citizens of
28 different states in which the matter in controversy exceeds, exclusive of costs

1 and interest, seventy-five thousand dollars (\$75,000.00.)

2
3 VENUE

4
5 5. Venue is proper in this district in that all Defendants are subject to
6 personal jurisdiction in this district at the time the action is commenced.

7
8 BACKGROUND ALLEGATIONS

9
10 6. ASIC issued successive commercial general liability policies to Signs
11 & Pinnick, Inc. ("Signs & Pinnick"), policy numbers XGI 01-2732-001 and XGI
12 01-2732-002, with effective dates of November 1, 2001, to November 1, 2003,
13 (referred to herein as the "ASIC policies"). The ASIC policies contain various
14 conditions on coverage as well as exclusions.

15
16 7. National Union issued a commercial general liability policy to Signs
17 & Pinnick with effective dates commencing November 1, 2003, to November 1,
18 2004.

19
20 8. On or about February 16, 1999, Signs & Pinnick contracted with
21 developer 4S Kelwood General Partnership ("Kelwood") to perform work on
22 seven (7) single family home building sites at the "4S Ranch" residential
23 development located at Lone Bluff Way, San Diego, California. Pursuant to the
24 contract, Signs & Pinnick's scope of work included rough grading, subterranean
25 drainage systems, support buttresses and retaining walls, reservoir excavation
26 and finish pad grading. Signs & Pinnick substantially completed its work in
27 June of 2000.
28

1 9. On or about, July 12, 2001, Kelwood sold the seven (7) lots to
2 developer, PLC 4S Ranch, LLC ("PLC 4S"). PLC 4S constructed seven (7)
3 homes on the lots. The Notice of Completion dates for these homes are all in
4 November of 2002.

5
6 10. PLC 4S sold the seven (7) homes to individual homeowners, who
7 purchased and moved into them in November and December of 2002.

8
9 11. On February 15, 2005, Kellwood filed a lawsuit for construction
10 defects and damages against various defendants, including Signs & Pinnik,
11 entitled *4S Kelwood General Partnership, et al. v. Geocon, et al.*, San Diego
12 Superior Case No. GIC871912 (hereinafter referred to as the "Kelwood
13 Action"). The operative Complaint in the Kelwood Action alleged that the
14 homeowners began complaining of soil subsidence problems in 2003. The
15 Complaint further alleged that, following investigation and testing, PLC 4S
16 agreed, as part of a settlement with Kelwood, to pay Kelwood \$2,000,000.00
17 and to assign all claims and rights of PLC 4S against defendants to Kelwood.
18 Also as part of a settlement with the homeowners, Kelwood agreed to purchase
19 back the seven (7) homes at a total cost of \$7,215,409.00. Kelwood alleged that
20 they expended, and would continue to expend, considerable amounts to
21 investigate and repair the properties. Per the Complaint, the seven (7) homes are
22 currently owned by Kelwood and occupied by renters.

23
24 12. Developer JMIR-Otay Multifamily, LLC contracted with general
25 contractor Wermers Corporation ("Wermers") to construct a three hundred and
26 sixty-four (364) unit apartment complex located at 1020 and/or 1100 Dennerly
27 Road, San Diego, California. Thereafter, on October 24, 2001, Wermers entered
28 into a subcontract agreement with Signs & Pinnick to perform grading services

1 at the project. Signs & Pinnick's work was substantially completed on or before
2 September 23, 2002. The entire project was substantially completed on or
3 before June 25, 2003. On or shortly after October 30, 2003, the project was sold
4 to R & V Management Corporation and assigned soon thereafter, on or before
5 December 19, 2003, to Casoleil, LP, Cliffbridge Manor, LP, and Sunset South
6 Bay, LTD (collectively referred to hereinafter as "Casoleil").

7
8 13. On March 13, 2006, Casoleil filed a lawsuit for construction defects
9 and damages against Wermers entitled *Casoleil L.P., et al. v. Wermers*
10 *Corporation, et al.*, San Diego Superior Case No. GIC862625 (hereinafter
11 referred to as the "Casoleil Action," and combined with the Kelwood Action,
12 collectively referred to herein as the "Underlying Actions"). Thereafter, on or
13 before November 29, 2006, Wermers filed a cross-complaint against various
14 subcontractors, including Signs & Pinnick.

15
16 14. The operative Complaint in the Casoleil Action asserts with respect to
17 the purported property damages that:

- 18
19 a. "Plaintiffs allege that construction and design deficiencies at
20 the Subject Property have developed and occurred over time
21 and have resulted in continuous and progressive physical
22 damage and loss of use of the Subject Property;" and
23
24 b. "Within the past two years, Plaintiffs became aware of facts
25 which thereafter, upon investigation, resulted in Plaintiffs
26 being informed that portions of the Subject Property were not
27 adequately built, constructed, developed, designed, supervised
28 or otherwise improved so that defective conditions exist and do

1 now exist, and accordingly, the Subject Property is defective,
2 not of merchantable quality, and not reasonably fit for its
3 intended purpose.”

4
5 15. As a result of the Underlying Actions, Signs & Pinnick tendered its
6 defense and indemnity to ASIC. Tenders were also sent to insurer, American
7 International Group, Inc. (“AIG”), the parent company of National Union.

8
9 16. Plaintiff is informed and believes and thereon alleges the Underlying
10 Actions involved allegations and claims for property damage which potentially
11 first took place during the effective periods of insurance issued by National
12 Union and DOES 1 to 10.

13
14 17. ASIC agreed to defend Signs & Pinnick in the Underlying Actions
15 under a reservation of rights. National Union denied the tenders.

16
17 18. To date, ASIC has paid well in excess of \$1,000,000.00 (Kelwood
18 Action) and \$300,000.00 (Casoleil Action) in connection with the defense of
19 Signs & Pinnick in regard to the Underlying Actions.

20
21 19. ASIC is informed and believes that National Union and DOES 1 to 10
22 issued one or more primary commercial general liability policies and had a duty
23 to defend Signs & Pinnick in the Underlying Actions.

24
25 20. Plaintiff is informed and believes and thereon alleges that National
26 Union and DOES 1 to 10 improperly denied the tenders.

27
28 21. National Union and DOES 1 to 10 improperly refused to participate

1 in the defense of Signs & Pinnick in the Underlying Actions.

2
3 **CAUSES OF ACTION**

4
5 **FIRST CAUSE OF ACTION**

6 **DECLARATORY RELIEF AGAINST NATIONAL UNION AND DOES 1**
7 **TO 10**

8
9 22. Plaintiff incorporates by reference paragraphs 1 through 21 of this
10 Complaint as though fully set forth herein.

11
12 23. An actual, present and justiciable controversy has arisen and now
13 exists between ASIC and Defendants concerning the parties' respective rights,
14 duties and obligations in that ASIC contends, pursuant to the terms of
15 Defendants' policies issued to Signs & Pinnick, Defendants were each required
16 to participate in the defense of Signs & Pinnick in connection with the
17 Underlying Actions, and Defendants dispute this contention.

18
19 24. By reason of the foregoing, Plaintiff seeks a judicial determination of
20 the parties' respective duties under their respective insurance policies in
21 connection with the defense of Signs & Pinnick in the Underlying Actions.

22
23 **SECOND CAUSE OF ACTION**

24 **EQUITABLE CONTRIBUTION AS AGAINST NATIONAL UNION AND**
25 **DOES 1-10**

26
27 25. Plaintiff incorporates by reference paragraphs 1 through 24 of this
28 Complaint as though set forth fully herein.

1
2 26. National Union has failed and refused to fulfill its duty to defend
3 Signs & Pinnik in connection with the Underlying Actions leaving ASIC no
4 choice but to pay in excess of its fair share of said defense costs.

5
6 27. By reason of National Union's failure and refusal to participate in the
7 defense of Signs & Pinnick in the Underlying Actions, National Union has
8 damaged ASIC and is liable to ASIC for any sums expended by ASIC to defend
9 Signs & Pinnick in the Underlying Actions that are in excess of ASIC's equitable
10 share.

11
12 **PRAYER FOR RELIEF**

13
14 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

15
16 1. For a declaration that Defendants had a duty to defend Signs &
17 Pinnick in connection with the claims, demands, and causes of action alleged in
18 the Underlying Actions;

19
20 2. For a declaration of each party's proportionate or equitable share of
21 contribution toward the defense of Signs & Pinnick in the Underlying Actions;

22
23 3. For compensatory damages for declaratory relief and/or contribution
24 according to proof, and interest thereon including prejudgment interest, in an
25 amount within the jurisdiction of this Court;

26
27 4. For costs of suit incurred herein; and
28

1 5. For such other and further relief as the Court may deem just and
2 proper.

3
4 Respectfully submitted,

5
6 DATED: December 11, 2009

BLAU & ASSOCIATES, P.C.

7
8 By: 

9 David S. Blau
10 Attorney for Plaintiff
11 American Safety Indemnity Company
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a Trial by Jury.

Respectfully submitted,

DATED: December 11, 2009

BLAU & ASSOCIATES, P.C.

By: 

David S. Blau
Attorney for Plaintiff
American Safety Indemnity Company

ORIGINAL

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

American Safety Indemnity Co., an Oklahoma Corporation,

(b) County of Residence of First Listed Plaintiff Oklahoma County, OK
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

David S. Blau (SBN 166825), Blau & Associates, P.C., 6080 Center Drive, Suite 550, Los Angeles, CA 90045, (310) 410-1900

DEFENDANTS

National Union Fire Ins. Co. of Pittsburgh, Pa., a Pennsylvania Corporation; and DOES 1 through 10, inclusive

County of Residence of First Listed Defendant Travis County, TX
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input checked="" type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

- | | | | | | |
|---|--|---|--|--|--|
| <input checked="" type="checkbox"/> 110 Insurance | <input type="checkbox"/> 310 Airplane | <input type="checkbox"/> 362 Personal Injury - Med. Malpractice | <input type="checkbox"/> 610 Agriculture | <input type="checkbox"/> 422 Appeal 28 USC 158 | <input type="checkbox"/> 400 State Reapportionment |
| <input type="checkbox"/> 120 Marine | <input type="checkbox"/> 315 Airplane Product Liability | <input type="checkbox"/> 365 Personal Injury - Product Liability | <input type="checkbox"/> 620 Other Food & Drug | <input type="checkbox"/> 423 Withdrawal 28 USC 157 | <input type="checkbox"/> 410 Antitrust |
| <input type="checkbox"/> 130 Miller Act | <input type="checkbox"/> 320 Assault, Libel & Slander | <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 | <input type="checkbox"/> 820 Copyrights | <input type="checkbox"/> 430 Banks and Banking |
| <input type="checkbox"/> 140 Negotiable Instrument | <input type="checkbox"/> 330 Federal Employers' Liability | <input type="checkbox"/> 370 Other Fraud | <input type="checkbox"/> 630 Liquor Laws | <input type="checkbox"/> 830 Patent | <input type="checkbox"/> 450 Commerce |
| <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment | <input type="checkbox"/> 340 Marine | <input type="checkbox"/> 371 Truth in Lending | <input type="checkbox"/> 640 R.R. & Truck | <input type="checkbox"/> 840 Trademark | <input type="checkbox"/> 460 Deportation |
| <input type="checkbox"/> 151 Medicare Act | <input type="checkbox"/> 345 Marine Product Liability | <input type="checkbox"/> 380 Other Personal Property Damage | <input type="checkbox"/> 650 Airline Regs. | | <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations |
| <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) | <input type="checkbox"/> 350 Motor Vehicle | <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 660 Occupational Safety/Health | | <input type="checkbox"/> 480 Consumer Credit |
| <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits | <input type="checkbox"/> 355 Motor Vehicle Product Liability | | <input type="checkbox"/> 690 Other | | <input type="checkbox"/> 490 Cable/Sat TV |
| <input type="checkbox"/> 160 Stockholders' Suits | <input type="checkbox"/> 360 Other Personal Injury | | | | <input type="checkbox"/> 810 Selective Service |
| <input type="checkbox"/> 190 Other Contract | | | <input type="checkbox"/> 710 Fair Labor Standards Act | <input type="checkbox"/> 861 HIA (1395ff) | <input type="checkbox"/> 850 Securities/Commodities/Exchange |
| <input type="checkbox"/> 195 Contract Product Liability | | | <input type="checkbox"/> 720 Labor/Mgmt. Relations | <input type="checkbox"/> 862 Black Lung (923) | <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 |
| <input type="checkbox"/> 196 Franchise | | | <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act | <input type="checkbox"/> 863 DIWC/DIWW (405(g)) | <input type="checkbox"/> 890 Other Statutory Actions |
| | | | <input type="checkbox"/> 740 Railway Labor Act | <input type="checkbox"/> 864 SSID Title XVI | <input type="checkbox"/> 891 Agricultural Acts |
| <input type="checkbox"/> 210 Land Condemnation | <input type="checkbox"/> 441 Voting | <input type="checkbox"/> 510 Motions to Vacate Sentence | <input type="checkbox"/> 790 Other Labor Litigation | <input type="checkbox"/> 865 RSI (405(g)) | <input type="checkbox"/> 892 Economic Stabilization Act |
| <input type="checkbox"/> 220 Foreclosure | <input type="checkbox"/> 442 Employment | <input type="checkbox"/> 530 General | <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | | <input type="checkbox"/> 893 Environmental Matters |
| <input type="checkbox"/> 230 Rent Lease & Ejectment | <input type="checkbox"/> 443 Housing/Accommodations | <input type="checkbox"/> 535 Death Penalty | | <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) | <input type="checkbox"/> 894 Energy Allocation Act |
| <input type="checkbox"/> 240 Torts to Land | <input type="checkbox"/> 444 Welfare | <input type="checkbox"/> 540 Mandamus & Other | | <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 895 Freedom of Information Act |
| <input type="checkbox"/> 245 Tort Product Liability | <input type="checkbox"/> 445 Amer. w/Disabilities - Employment | <input type="checkbox"/> 550 Civil Rights | <input type="checkbox"/> 462 Naturalization Application | | <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice |
| <input type="checkbox"/> 290 All Other Real Property | <input type="checkbox"/> 446 Amer. w/Disabilities - Other | <input type="checkbox"/> 555 Prison Condition | <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee | | <input type="checkbox"/> 950 Constitutionality of State Statutes |
| | <input type="checkbox"/> 440 Other Civil Rights | | <input type="checkbox"/> 465 Other Immigration Actions | | |

V. ORIGIN

- (Place an "X" in One Box Only)
- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332 (diversity)Brief description of cause:
Declaratory Relief, Contribution, Subrogation (carrier vs. carrier insurance coverage)

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

12/11/2009

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

8214

AMOUNT

30.-

APPLYING IFP

JUDGE

MAG. JUDGE

12/11/09

CR

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS008214
Cashier ID: sramirez
Transaction Date: 12/11/2009
Payer Name: ACE MESSENGER

CIVIL FILING FEE

For: AMERICAN SAFETY V. NAT. UNION
Case/Party: D-CAS-3-09-CV-002778-001
Amount: \$350.00

PAPER COPIES

For: AMERICAN SAFETY V. NAT. UNION
Amount: \$1.00

CHECK

Check/Money Order Num: 43062
Amt Tendered: \$351.00

Total Due: \$351.00
Total Tendered: \$351.00
Change Amt: \$0.00

There will be a fee of \$45.00
charged for any returned check.